IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 20

STATE OF CALIFORNIA AND BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR,

Appellants,

vs.

UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION, ENCINAL TERMINALS, HOWARD TERMINAL, AND PARR-RICHMOND TERMINAL CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANTS.

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Introduction.

The only briefs filed by Appellees are those of United States of America and United States Maritime Commission. These last named Appellees will hereinafter be referred to jointly as "the Government".

On account of the rather full statements of the facts of the case at bar and the proceedings before the United States Maritime Commisison, and in the Lower Court in relation thereto, both in the Appellants' and the Government's brief,

that part of the Government's brief relating thereto will not be commented upon. Appellants therefore proceed directly to a consideration of the arguments advanced by the Government and in doing so will discuss its points in the order in which they are considered in the Government brief.

ARGUMENT.

I.

Neither of Appellants is subject to the exercise of Federal jurisdiction over their administration or operation of the State-owned wharves and Terminal facilities at San Francisco, under the Commerce Clause of the United States Constitution or otherwise.

Briefly stated, the Government, on this point, argues that the Port facilities of Appellants are "necessary factors" in the flow of the Nation's domestic and foreign commerce and thus constitute "an interstate commerce agency"; that a State does not possess authority to withdraw, by any means whatsoever, interstate commerce matters from Federal regulation; and that State or local governments which engage in any activity which may be regulated under the Federal commerce power are no less subject than are private persons to the exercise of that power, citing in support of the last statement *United States* v. *California*, 297 U. S. 175, and *Union Pacific R. Co.* v. *United States*, 313 U. S. 450. Aside from the two last named cases, all of the cases cited under this division of the Government's argument involve situations wholly unrelated to the exercise of a governmental function by a State or its agency or any subdivision thereof.

Furthermore, *Union Pacific R. Co.* v. *United States*, *supra*, does not involve port activity in any way. The Court was there concerned with the regulation of a produce market

in Kansas City, Kansas, owned and operated by Kansas City, Kansas. It is distinguishable from the case at bar for three reasons: (1) because it involves a municipality and not a State, (2) because port activities were not being regulated, (3) because the activity in which the City engaged was one which traditionally is of a private and proprietary character.

The Government has wholly ignored the demonstration in the Appellants' brief that the State of California and its agency, the Board of State Harbor Commissioners for San Francisco Harbor, in administrating and conducting the harbor of San Francisco is engaged in and exercising powers and duties of a governmental character; that port and harbor developments and operations are traditionally governmental activities, as shown by the decisions cited by Appellants; that while the United States Supreme Court has at various times considered the power of a State or a municipality to construct, maintain and administer wharves, it has never directly held that a port so conducted is subject to the commerce power of the Constitution.

The Court did not so hold in *United States* v. *California*, *supra*, for in that case the function being considered was the operation of the State Belt Railroad, an activity which has traditionally been carried on by private persons or corporations. The power of Congress to regulate ports or harbors was not considered in that case.

The question of the application of the commerce clause of the Constitution in the instant case is an open one and must therefore be decided in this case.

We stress here the nature and extent of the regulation of the State of California in its ownership and administration of San Francisco Harbor which is being attempted by the United States Maritime Commission in the present instance. The Order of the Commission of September

11, 1941, complained of by Appellants (R. 40, 41-42, 44, 45), not only provides for minimum rates of wharf demurrage and storage on the wharf facilities of Appellants, but in addition,

(1) Provides a daily rate for such charges, instead of a period rate which has heretofore been and now is established by Appellants (R. 457-458).

(2) Provides for a "handling" charge to be collected when cargo goes into storage, notwithstanding the fact that Appellants have never heretofore performed any handling services on its wharves (R. 476-477).

The order, therefore, if put into effect would revolutionize the entire plan of administration of the port, and compel the State to adopt and use a fiscal policy not of its own choice. Worse than this, the order would compel the State either to perform handling charges on its wharves, or, if it does not do so, to make a charge for work that it does not perform—an unconscionable exaction which should not and cannot constitutionally be forced upon a sovereign State.

Even if it be assumed that Congress may regulate the State in the administration of its port, it seems clear that its power of regulation is limited. Such regulation must be within reasonable bounds.

Even if Congress can constitutionally authorize regulation, and has done so, the Commission in the instant case has clearly acted in excess of jurisdiction and for that reason alone its said Order of September 11, 1941, is void and of no effect.

It is submitted that, for all the reasons given in the opening brief of Appellants, it must be held that the operation and administration of the State-owned facilities of San

Francisco Harbor by Appellants is not subject to Federal jurisdiction or control under the commerce clause of the Constitution of the United States, or otherwise, and that the particular control sought to be exercised in the instant case is in excess of the jurisdiction of the United States Maritime Commission.

II.

The Shipping Act of 1916, as amended, does not authorize regulation of Appellants as "Other Person(s) Subject to This Act".

A. Both the State of California and Its Agency, Board of State Harbor Commissioners for San Francisco Harbor, Hereinafter Called the "Board", Are Excluded by the Act's Definition of "Other Person(s) Subject to this Act".

As shown in the statement of the case in Appellants' opening brief, and also in Point 1, particularly pp. 30-34 of said brief, the Board is a regularly constituted agency of the State of California, operating under the laws of said State, chiefly the provisions of the Harbors & Navigation Code of said State. The Board, therefore, has no separate existence from the State, corporate or otherwise, and all of its acts and activities are acts and activities of the State.

The Government on pages 30, 31 and 32 of its brief refers to the definitions of Section 1 of the Shipping Act of 1916, as amended, and states that "The pertinent classification in that part of the Act is 'other person(s) subject to this Act.'" We have no quarrel with the statement on page 31 that the word "includes" is used in different senses, depending upon the intention in each case. Appellants do take issue, however, with the statements that *Ohio v. Helvering*, 292 U. S. 360 [redacted] hold that States are "persons" under similar definitions.

A reading of [redacted] cases will show that the definitions of the word "person" or "persons" considered in [redacted] cases [redacted] different from that in the above-mentioned Act.

The definition of the expression in *Ohio* v. *Helvering* was as follows: "* * * The word 'person' as used in this title, shall be construed to mean a partnership, association, company, or corporation, as well as a natural person." This is very different from the definition in Section 1 of the Shipping Act, which says that: "The term 'person' includes corporations, partnerships and associations existing under or authorized by the laws of the United States, or any State * * *"

Appellants also take issue with the statements on pages 32 and 33 of the Government's brief that the legislative history of the Shipping Act, 1916, as amended, shows that it was intended to apply to public bodies, and in particular to a sovereign State or its agency.

With respect to the statement attributed on page 33 of the Government brief to Congressman Alexander (53 Cong. Rec. 8276), we have to state that said statement is not altogether clear in its meaning and we call attention to the statement of Congressman Humphrey, immediately following the statement of Mr. Alexander, in which Mr. Humphrey said "None at all", and added that time might have been saved if this answer had been given at the outset of the colloquy.

Reading both statements it would appear that Mr. Humphrey understood that the Act was not to apply to the municipalities referred to. In any event, no reference was made to a sovereign State.

Without further discussion of this matter we here refer to the rather full treatment of the history of the Act as set

out on pages 55 to 72 of Appellants' opening brief, which, we submit, demonstrates that it was not the intention of Congress that the word "person" as used in the Shipping Act, 1916, as amended, should include a sovereign State or any of its agencies.

B. *Appellants, on Other Grounds, Are Excluded by the Definition of "Other Person(s) Subject to this Act".*

The Government on pages 34 to 39, inclusive, of its brief considers Appellants' contention that Appellants are not covered by the definition of "Other Person(s) subject to this Act" on two additional grounds: *First*, that it does not carry on the "business" of furnishing terminal facilities, and, *secondly*, that even if it does carry on such a business, it does not do so "in connection with a common carrier by water."

South Carolina v. *United States*, 199 U. S. 437, 447-448, 463, is cited in support of a denial of the State's contention in this regard.

The last named case involved the power of the Federal Government to tax the State of South Carolina and its agents in the dispensation and sale of liquors under the State's dispensary laws. The activity of the State considered in that case was one which was traditionally, and at the time of the formation of the National Government, carried on by private persons. It was not an activity which could ordinarily be considered as governmental in character. Furthermore the case showed that it was carried on by the State, through its dispensing agents, at a large profit. It was altogether reasonable, therefore, that this Court should have held that the State was engaged in the business of dispensing liquor.

The activity considered in the case of *Texas & Pacific Ry.*

Co. v. *United States*, 289 U. S. 627, was the private operation of a port by a railroad corporation. It was in no sense a governmental activity.

It is clear, therefore, that neither of these cases is authority for the proposition that the State of California or its agent, the Board, is engaged in a "business" in administering and conducting the Harbor of San Francisco.

Appellants have discussed this question at pages 75 to 82 of its opening brief, which discussion is hereby referred to, and the cases cited therein.

The facts stated at pages 30-35 of Appellants' brief together with the statutory provisions referred to in pages 33, 34 of said brief, show that the State of California in administrating the Harbor is authorized to do so and is doing so in the exercise of a governmental function, and is not conducting the Harbor as a business enterprise but rather in the interests of the people of the whole State of California, in order to promote the commerce of the State for the public good. Such activity is the very antithesis of "business" in the sense in which that term is commonly used, and it is submitted, as that term is used in the Shipping Act.

At this stage of its argument the Government also takes issue with Appellants' contention that its terminal facilities at San Francisco are not furnished "in connection with a common carrier by water". Reference is made to Appellants' brief, pages 77, 78, 81, 82 where this question is discussed, and the case of *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 462, 466, is referred to as authority that the expression above quoted is not suggestive of the "technical connotation" urged by Appellants.

As Appellants have stated in their opening brief, there is no decision as to the exact meaning of the expression "in

connection with a common carrier by water". Manifestly it must have some meaning.

The Government thinks that the expression is used to distinguish port facilities built and maintained for the accommodation of water carriers from such facilities operated and conducted as adjuncts of rail or other land carriers.

As Appellants have stated in their opening brief, the history of the Shipping Act of 1916, as amended, shows that the chief evil sought to be controlled by the legislation was the control exercised by land carriers over water carriers and the inducements offered to the latter by the former in the way of free port facilities in order to gain business and monopolize transportation of certain steamship lines. Port facilities operated in this manner by land carriers were undoubtedly in the minds of the legislators when enacting the statute and the phrase "in connection with a common carrier by water", aptly describes the relationship of such land carriers to water carriers, and imports a participation by the land carrier in the transportation service rendered by the water carrier. Of course, the facts of this case show that neither of the Appellants, at any time before or during the investigation conducted by the Commission, was taking any part in the transportation service of a water carrier. This is clearly shown in Appellants' opening brief.

The expression "in respect to the transportation of property" used in the Elkins Act (32 Stat. 847, 34 Stat. 587; 49 U. S. C. 41 (1)) is so different in its wording and so much broader in its meaning that the case of *Union Pacific R. Co.* v. *United States*, *supra*, is not helpful in determining the meaning which must be attributed to the expression "in connection with a common carrier by water" used in the Shipping Act of 1916, as amended.

III.

The Commission's order fixing maximum free time allowances and minimum demurrage and storage charges is not within the authority conferred by Sections 16 and 17 of the Act, and is not supported by the Commission's findings, which in turn are not supported by the evidence.

On pages 39 to 41 of its brief, without attempting to answer the contentions of Appellants that there is no authority given in the Shipping Act to regulate the rates of "other person(s) subject to the Act", the Government simply states that the Commission found violations of Sections 16 and 17 of the Act in connection with allowances of free time and that, by ordering Appellants with others, to observe a prescribed schedule of free time, the Commission acted within the scope of its authority under Sections 16 and 17.

A. Neither the Statute, the Findings, nor the Evidence Supports the Commission's Order Fixing Maximum Free Time Allowances.

Under this division of its argument on this question, the Government refers to the finding that certain ports, *not including California*, extended their regular free time allowances, "for such indeterminate additional time as may be necessary to cover delays in vessel sailings". It also refers to the finding that as to certain kinds of traffic, the basic 10-day free time period was unreasonable and violative of Sections 16 and 17.

It is then stated:

> "The essence of the Commission's findings as to the discriminatory nature and unreasonableness of excessive free time allowances is that this results in a wastage of valuable storage facilities, involving costs

> whose recoupment ultimately casts a burden upon non-users of the surplus period; and that the furnishing of valuable storage facilities free of charge results in substantial inequality of service among different shippers and cargoes, unduly preferring users of the surplus period over nonusers, and is beyond the 'recognized functions' of the terminals (R. I, 24)."

The basis for the position outlined in the above quotation seems to be that users of the port facilities who do not take advantage of free time allowances are burdened by the higher charges for other services, which higher charges must be made because of the "wastage of valuable storage facilities" during surplus free time periods. This argument presupposes that the loss caused by such wastage is made up by higher charges for other services in order to make the whole enterprise pay out. This argument is made in the face of the contention of the Government on page 76 of its brief that the amounts by which annual revenues fall short of annual costs incurred in terminal operations at San Francisco in 1939 and 1940 were $1,405,634 and $1,285,786, respectively.

Now if the Government is right about these shortages, it is pertinent to ask how any shipper or vessel, in taking advantage of the excessive free time, is burdened by excessive payments for other services. Certainly these large deficits cannot be made up by shortening free time, nor, if the claim of the Government as to the amount of these shortages is correct, is there any burden in the way of higher charges imposed on the non-user of free time. On the contrary, the facts relied upon by the Government show that this burden has been assumed by Appellants, the owners and administrators of the facilities. Can the Government object to this assumption of burden by a sovereign state? Isn't the burden doctrine confined to cases where the party furnishing the other services must and

does impose higher rates in order to meet its costs and earn something more in the way of profits?

Under the facts of this case there is no evidence of a burden cast upon the non-users of free time.

Furthermore, it appears that Appellants were and are not offenders as to the granting of excessive free time or extending the periods allowed by its tariff, for in the Report of the Commission (R. 23-24), it is said:

> "The uniformity of the free time period allowed at the larger terminals is more apparent than real. Generally, 10 days are permitted except that San Francisco allows 5 days in coastwise and intercoastal (inbound) trades and 7 days in the foreign and off-shore trades (inbound) * * * San Francisco grants no extensions of free time * * *."

It also appears (R. 25), that members of the Northwest Terminal Association as well as terminals at Los Angeles provide 10 days free time in inter-coastal (outbound) and foreign and off-shore trades, and that in other trades these terminals, like San Francisco, grant 5 days, except that in Seattle and Tacoma the time is 10 days on coastwise (outbound).

It therefore is clearly established that so far as the Appellants are concerned, there was no excessive free time allowance and no extensions of free time periods, hence no unreasonable or unjust practice in violation of either Section 16 or 17 of the Act.

B. Neither the statute, the findings nor the evidence supports the Commission's order fixing minimum wharf demurrage and storage charges.

Under Subsection B of Part III of its brief the Government attempts to establish the opposite of the above stated position.

First it distinguishes between demurrage and storage

charges, stating that a demurrage charge is ordinarily a penalty charge designed to clear transit space by forcing the cargo off the dock or into wharf storage on a period basis. It is then stated that wharf demurrage rates had been so reduced that it was difficult to distinguish between wharf demurrage and storage.

On page 47, reference is made to the Commission's determination of the existence of unduly preferential and unreasonable practices in connection with these charges in that they did not compensate the terminals for the services rendered and thus gave rise to the same basic evils as the excessive free time allowances.

Reference is also made to the finding of the Commission that the evidence as to the cost of these services (demurrage and storage) showed that the going rates produced revenues "far below the cost of the service" with the consequence that "users of wharf storage are not providing their proper share of essential terminal revenues", while a disproportionate share of this burden was imposed upon users of other services, for which the terminals had adopted a scale of rates previously found to be reasonable by the California Railroad Commission.

The same comment is pertinent here as that which we have hereinabove made with regard to the fanciful idea of the imposition of a burden upon users of other services consequent upon the granting of extensive free time allowances. In the case of under charges for wharf demurrage and storage charges, as well as in the case of extensive free time allowances, there can be no imposition of a burden upon the users of other services who are nonusers of the demurrage or storage privileges, unless the charges for the other services are raised to a higher level by the furnisher of such services in an endeavor to make the "business" as a whole result in a profit or at least square revenue with expenses.

It seems clear that no resulting burden is cast upon the user of such other services in a case where the party furnishing the same is, by reason of its public character and the backing of a sovereign state, privileged to render all of its services at cost or even less than cost, in the interests of the State as a whole.

That the State of California, in furnishing such other services, does so without any purpose of making a profit is clear from the provisions of law governing its activities (Sections 3080 and 3084, Harbors and Navigation Code of California); and from the data relied upon by the Government in its Brief, page 76, it would appear that the State is falling far short of coming out even on its Harbor enterprise. The extent of the alleged failure to do this, as shown by such figures, is apparent, when we compare the deficits alleged by the Government of $1,405,634 and $1,285,786 for the years 1939 and 1940 respectively, with the total revenues of $2,380,822.06 and $2,483,253.87 for the years 1939 and 1940 respectively. Exhibit No. 135 (R. 1255, 1258, In Evidence R. 539).

It is at once apparent that, if the Government figures for deficits are correct, there would have to be an increase of over 50% in total revenue in order that the Harbor revenues may equal its expenses, including depreciation, interest on bonds, etc.

Witness Differding for the Commission stated at the hearing before the Commission (R. 716), with respect to wharf demurrage and storage charges:

> "There are very substantial increases necessary in these charges to compensate the terminals even on a minimum basis, and back in 1933 we found, using the low cost facilities both as to direct and overhead expenses as well as floor space, that a minimum of 33⅓% increase was necessary and we also took into consideration the reduction in free time which we as-

sumed would result in a 10% increase in the amount of wharf demurrage for the year's operations."

A reference to Exhibit No. 135 above mentioned (R. 1277, In Evidence R. 539), shows that the collections of the Harbor of San Francisco for wharf demurrage for the year 1939 was $55,301.10, and for 1940, was $71,009.54. A 33⅓% increase of the larger of these two sums would amount to $23,669.55.

Referring again to Exhibit No. 135 (R. 1277), we call attention to the fact that the total of demurrage charges of all kinds assessed and collected at Piers 45 and 56 for the fiscal year ending June 30, 1940, of Appellants is $20,533.90. The difference between this sum and $71,009.54 is $50,565.64, the sum of demurrage collected at the so-called "assigned piers".

With respect to the effect of the order of the Commission on the amount of demurrage which will be collected on the "assigned piers" under the Order of the Commission of September 11, 1941, establishing minimum rates, the Commission said in its Report, which was the basis of the Order:

> "It is not believed that any *increases* in storage rates would result from the establishment of the 4090 scale at the San Francisco assigned piers." (R. 37) (Emphasis ours)

The 4090 scale referred to was the scale prescribed in the Order (R. 37).

Such increases in demurrage and storage charges, therefore, as will result from the order at the Port of San Francisco will be at Piers 45 and 56, provided these piers continue to be operated as terminals. (While not shown in the record, it is pertinent to observe that these terminals are now discontinued, and the Army and Navy have the

use of these piers, free from demurrage and storage charges).

If the rates ordered by the Commission should result in the desired 33⅓% increase, the amount realized therefrom would be 33⅓% of $20,533.90, or $6,844.63.

Now by reference to Exhibit No. 135 (R. 1258, In Evidence R. 539), it will be seen that for this same calendar year ending June 30, 1940, the total amount of tolls and dockage collected at the Port of San Francisco was $1,044,130.99. Simple calculation shows that $6,844.63 is 6/10 of 1% of $1,044,130.99.

It is clear, therefore, that the "burden" cast upon users of the dockage and tolls services furnished by the Board, who do not avail themselves of the wharf storage and demurrage services is 6/10 of 1% of what they pay for such other services. For every $100.00 they pay to the Board, they are burdened by an excess charge of 60 cents.

Do these facts show that the Appellants' demurrage and storage rates were producing revenues *substantially* less than cost? Clearly the difference between revenues and cost were unsubstantial to the extent of being *microscopic*, in comparison with costs of other services.

It also follows that the discrimination against non-users of these services was equally unsubstantial and trifling.

The only conclusion to be drawn from these considerations is that the asserted imposition of a burden upon such users of other services is altogether fanciful, and is unsupported by the evidence.

(1) The terms "Regulations and Practices", as used in Section 17 of the Act, do not include wharf demurrage or storage rates or charges

In endeavoring to establish the opposite of the above-stated proposition, the Government on page 50 of its Brief refers to Appellant's discussion of this question, which may be found on pages 85-94 of Appellant's Brief, and

proceeds to discuss what it terms the "normal meaning of the terms, regulations and practices".

The Government says on page 50 that these words, "regulations and practices" are fundamentally words of broad meaning, and may well include rates as well as other charges.

The breadth of the meaning of these terms must be judged by the context and by their setting in the Statute. In Section 17 of the Act, the words are used in paragraph 2 but not in paragraph 1 where only a "rate, fare, or charge" is mentioned. In Section 18, relating to a common carrier by water in Interstate Commerce, it is provided that such carrier "shall establish, observe and enforce just and reasonable rates, fares, charges, classifications and tariffs, and just and reasonable *regulations and practices* relating *thereto.*" (Italics ours.)

It is apparent that, as used in Section 18, the words "regulations and practices" are not broad in their meaning but on the contrary are narrowly limited to actions with relation to rates, fares, etc. In other words, the terms are subordinate in meaning to the meaning given to rates, fares, etc., and are used to designate actions pertaining to the application of rates, but not including rates or the amounts at which they are fixed, independently of their application.

In Section 17, however, the terms "regulations and practices" are separated entirely in thought, meaning, and application from rates or charges of any kind.

It is, therefore, submitted that we must here consider not the normal meaning of these terms but the meaning attributed to them in the Statute, and in Sections 17 and 18, respectively.

On pages 52-54 of the Government Brief is a discussion of the legislative history of the Shipping Act of 1916, as amended, in which certain language used by the Members of the Senate Sub-committee on Commerce at the time of the consideration of H. R. 15455 is quoted and commented upon.

We submit that this language, used at random, does not explain away the precise language used in the Statute and cannot be relied upon to indicate the meaning of the terms "regulations and practices" as used in the *Act*.

On pages 54-58 of the Government Brief, the case of *B. & O. R. Co.* v. *United States*, 305 U. S. 507, 513, 522, 524 is cited for the purpose of showing that the Shipping Act of 1916, as amended, authorizes the fixing of storage rates, pursuant to the power of the Commission to establish just and reasonable "regulations and practices".

In this connection referrence is made to the *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 474, 481, in which this this Court, in speaking of the similarity of the Interstate Commerce Act and the Shipping Act of 1916, as amended, said:

> "It follows that the settled construction in respect of the earlier Act must be applied to the later one unless in particular instances there be something peculiar in the question under consideration or *dissimilarity in the terms of the Act relating thereto, requiring a different conclusion.*" (Italics ours.)

We submit that, in applying to the Shipping Act, 1916, as amended a construction given by this Court to the Interstate Commerce Act, we should bear in mind the above quoted language with reference to dissimilarity between the two Acts with regard to the matter under discussion.

In this connection we call attention to the close similarity between the provisions of Section 18 of the Shipping Act and Section 15(1) of the Interstate Commerce Act. Both sections relate to regulation of rates of common carriers and both provide for the establishment of "regulations and practices" in relation to *rates*.

It is submitted that both sections authorize "regulations and practices" in relation to rates, in contrast to the provisions of Section 17 of the Shipping Act which very care-

fully separates in thought and expression the words "Regulations and practices" on the one hand, and "rates" on the other.

On account of this difference in the provisions of these sections, it by no means follows that the decision of the *B. & O.* case that wharf storage rates are subject to regulation under Section 3(1) of the Interstate Commerce Act is authority for regulation by the Maritime Commission of storage rates of an "other person subject to this Act" under the provisions of Sections 16 and 17 of the Shipping Act of 1916, as amended.

In the *B. & O.* case, it would seem that the storage rates may reasonably be regulated as "regulations and practices" under the Act being construed, while on account of the "dissimilarity in the terms" of the Shipping Act, relating to "regulations and practices" of "other person(s) subject to this Act", a different conclusion would be required.

In other words, in the *B. & O.* case, a regulation and practice in regard to transportation rates was condemned, and we think such condemnation was authorized by the Interstate Commerce Act, but the holding in that case is not authority for similar action in the case at bar.

What we have here said with respect to the *B. & O.* case as an authority, applies equally to *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303, for, in that case, two sets of tariff rates of a common carrier by water and interstate commerce were involved, and, we think that under the provisions of Section 18 of the Shipping Act of 1916, as amended, the discrimination found by this Court to exist by reason of the two sets of transportation rates, constituted within the meaning of Section 18 "regulations and practices", which was rightly condemned under the authorization of Section 16 of the Shipping Act.

For these reasons the last named case is no more of an authority than the *B. & O.* case for the proposition that the storage rates of any "other person subject to this Act" may be regulated by the Maritime Commission as a "regulation or practice".

We see no pertinency to the matter before the Court of the discussion on pages 59-62 of the Government's Brief. All that is there said about the enforcement of orders of the Maritime Commission might just as well have been said of the order made by the Interstate Commerce Commission and the *B. & O.* case, *supra*, for in that case no rate of storage charges was fixed, the Commission going so far only as to order that the respondent carrier cease and desist from permitting such storage at rates and charges which failed to compensate the respondent railroad company for the cost of providing space.

(2) The Commission's Order was not Sustained by Its Findings nor by the Evidence Regarding Discrimination.

In view of the argument which we have hereinabove made with respect to the alleged discrimination resulting from the wharf demurrage and storage rates of these Appellants, and our demonstration that the facts established at the hearing before the Commission and shown by the record clearly show that the alleged discrimination was altogether fanciful and does not, in fact, exist, little need be said under this heading.

The Government states on page 67 of its Brief that "Shippers supplying the bulk of the terminals' traffic, as found by the Commission (R. I, 35), are not in a position to avail themselves of the below-cost storage services. Yet, such shippers are subject to the terminals' 'toll' charges (see page 5, *supra*), which they must pay in full without any

off-set from the warehousing. Likewise a burden is cast on the vessels which must pay 'dockage' and various other service charges. (See R. 716-717.)"

What we have hereinabove said about the entire absence of any burden completely refutes these conclusions, and also what is said on pages 68 and 69 under the same head.

We think it is pertinent here to add that any attempt on the part of the United States Maritime Commission or any other Federal agency to command the State of California, acting through its agency, the Board of State Harbor Commissioners for San Francisco Harbor, to so conduct the Harbor of San Francisco that it shall not lose money in the administration of the Harbor and shall not use monies derived from bond issues authorized by the people of the State for making up deficits, due to depreciation or other causes, is a high-handed attempt to interfere with governmental processes of the State, and is not authorized by the Constitution or any law of the United States.

(3) The Evidence Does Not Support the Commission's Finding That Appellants' Storage and Demurrage Charges Were Non-Compensatory.

The Government attempts on pages 69-77 to prove the opposite of the above stated proposition:

In discussing the question as to whether a burden has been cast upon parties using services furnished in connection with the administration of San Francisco Harbor other than wharf demurrage and storage, and resulting from wharf demurrage and storage rates, we have heretofore assumed the correctness of the data set out on pages 75 and 76 of the Government's Brief.

This assumption was made for the purpose of demonstrating that no such burden exists.

Appellants did not admit, however, and have not admitted

as a fact, that their wharf demurrage and storage rates are not compensatory or were not compensatory at or before the time of the hearing before the Maritime Commission.

In the Appellants' opening brief, we maintained, and now maintain, that the standard for determining whether such rates are or were compensatory should be the out-of-pocket costs of rendering the services.

In an attempt to show that Appellants' revenue from demurrage and storage at its terminals was less than its out-of-pocket costs, the Government uses data as to demurrage revenue at Piers 45 and 56 of San Francisco Harbor which, of course, constituted only a small part of the entire harbor coverage consisting of some 45 piers and wharves.

Appellants submit that any figures taken only from the activities pursued at these two piers is too sketchy and unreliable on which to base any conclusions as to the revenue derived from Harbor activities as a whole and its relation to costs for all such activities.

The cases cited by the Government in its Brief as to the probative value of data concerning only a part of a given territory or activity, do not here apply for the reason that the rates and charges for demurrage and wharfage at Piers 45 and 56 are in some cases much less than at other wharves, as shown by a comparison of the rates at those piers (R. 1086, In Evidence R. 651) with the rates which were in force at other piers (R. 1082-1083, In Evidence R. 651.)

In this connection we call attention to the fact that there was no investigation made at the hearing or by Witness Differding in connection with his various investigations with respect to costs of wharf storage and demurrage on any of the wharves of the State of California, including Piers 45 and 56, for Witness Differding stated, with respect to such investigation of cost of Piers 45 and 56:

"This is confined entirely to private terminals. We We made no physical checks of the public terminals except that the facilities under assignment, or what you choose to call it at that time the San Francisco Terminals, now called the Golden Gate Terminals, and State Terminals were using. We did make similar checks there. However, the matter of wharf demurrage, and the incidental charges in connection with it, were entirely under the control of the State Harbor Board and we went no further than that. In other words, as far as those two facilities are concerned, it was confined to the *services rendered other than the wharf demurrage or storage matters.*" (R. 247) (Italics added.)

As we have hereinabove shown, the degree to which the Appellants' wharf storage and demurrage rates were non-compensatory, if any, was negligible and wholly unsubstantial when compared, as they must be, with charges for other services of the port. Consequently it will serve no purpose to labor over the data set out on pages 74 to 77 of the Government brief. It is simply straining at a gnat.

It is clear also that any resulting discrimination was negligible and does not support either the findings of the Commission or the Order of September 11, 1941.

Conclusion.

For all of the reasons given in Appellants' opening brief and in this Reply brief, it is submitted that the final Decree of the United States District Court, appealed from by these Appellants, should be reversed and said Court directed to set aside, annul, cancel and permanently enjoin the enforcement of the Order of the United States Maritime Commission made and issued on September 11, 1941, in the proceed-

ings before said Commission in Docket No. 555, so far as it relates to these Appellants.

Respectfully submitted,

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